BEFORE THE
FEDERAL MARITIME COMMISSION
Washington, DC

Docket No. P3-03
Docket No. P7-03
Docket No. P8-03
Docket No. P9-03

COMMENTS OF
THE NATIONAL CUSTOMS BROKERS
AND FORWARDERS ASSOCIATION OF AMERICA, INC.'S
TO PETITIONS FILED BY
UNITED PARCEL SERVICE, INC., OCEAN WORLD LINES, INC.,
BAX GLOBAL, INC., and C.H. ROBINSON WORLDWIDE, INC.

Consistent with the various Notices issued by the Cominission, the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") hereby submits comments to the various Petitions for Exemption or Rulemaking filed by United Parcel Service, Inc. ("UPS") in Docket No. P3-03, Ocean World Lines, Inc., ("OWL") in Docket No. P7-03, BAX Global, Inc. ("BAX") in Docket No. P8-03, and C.H. Robinson Worldwide, Inc. ("Robinson") in Docket No. P9-03.[1]

I. INTRODUCTION

The NCBFAA is the national trade association representing the interests of freight forwarders, non-vessel operating common carriers ("NVOCCs") and customs brokers in the ocean shipping industry. The NCBFAA's members are integrally linked to approximately 90%

1 The NCBFAA recognizes that those four petitions have not been formally consolidated for handling by the Commission. Nonetheless, since the petitions raise similar issues of fact and law, and since the relief sought by petitioners is similar, it is far more efficient for the NCBFAA to submit its Comments in these four proceedings in a single document. The NCBFAA accordingly requests that a copy of these Comments be filed and considered in each of these proceedings.

of the cargo that moves into and out of the United States via ocean transportation. Together with its 30 local affiliates, the NCBFAA represents approximately 1000 licensed Ocean Transportation Intermediaries ("OTIs") in the United States and abroad. The great majority of the NCBFAA's OTI members operate both as NVOCCs and ocean forwarders. Petitioners UPS, through its subsidiary UPS Supply Chain Solutions, Inc., BAX and Robinson are members of NCBFAA.

The four petitions essentially fall into two categories - - one in which the petitioner requests an exemption that would authorize them to enter into service contracts with their shipper customers (*see* the UPS, BAX[2] and Robinson petitions), while one petition seeks the initiation of a rulemaking that would broaden the "special contract" rules applicable to freight forwarders so as to include NVOCCs and thereby permit NVOCCs to enter into confidential rate agreements with their customers.

From an overview perspective, the NCBFAA supports the service contract initiatives, although it disagrees with the criteria that those petitioners would have the Commission utilize and believes that the exemption must be available to all NVOCCs.[3] In other words, there is no logical, functional or legal distinction between the services provided by UPS, BAX and Robinson and those offered by other NVOCCs. Accordingly, while it is appropriate for the

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[2] The BAX petition apparently does not technically request that the Commission directly authorize it to enter into confidential ocean service contracts with its customers; instead, it requests the FMC to initiate a rulemaking that would result in the promulgation of regulations predicated upon several criteria that would permit BAX "and other similarly situated entities" to obtain that relief. (BAX petition at 1, 14-17.)

[3] The NCBFAA believes that the relevant factors militating in favor of granting UPS, BAX and Robinson the authority to enter into service contracts apply equally to all NVOCCs. Making the requested exemption available to only some NVOCCs, whether based on size, the existence of a "substantial" asset base, or some other parameter, would be problematical under Section 16 of the Shipping Act of 1984. Granting service contract authority to only some, but not all, NVOCCs would seriously alter the competitive landscape in the industry, reducing the competitive alternatives presently available to shippers.

Commission to grant this form of relief, it would not be appropriate to grant that relief solely to those parties.

On the other hand, while sympathetic to the problems raised by OWL, the NCBFAA does not agree with that petitioner's factual premise - - namely, that the problem confronting NVOCCs stems solely from the transparency of rate tariffs. Moreover, the relief sought by OWL -- while furthering the deregulatory objectives advanced by the NCBFAA's petition - - seems almost as burdensome as the present situation and thus would not seem to be a sufficient answer to the problem of the anachronistic, expensive, inefficient and useless system of rate tariffs.

As set forth more fully in NCBFAA's own petition for an exemption from the tariff publication and adherence requirements of the Shipping Act of 1984 (the "1984 Act"), the NCBFAA agrees that the deregulatory changes in congressional policy enacted in the Ocean Shipping Reform Act of 1998 ("OSRA"), in conjunction with the increased demand for specialized logistics services by shippers of all sizes, have transformed the ocean transportation industry. Vessel operating common carriers ("VOCCs") have adopted the use of confidential service contracts negotiated directly with their shipper customers as the predominant means of establishing rates and services. Although presently unable to enter into confidential service contracts, NVOCCs, like the VOCCs with which they compete, also now negotiate individualized rates and services with virtually all of their customers.[4] In other words, OSRA has spawned a competitive commercial marketplace in which shippers of all sizes expect and demand the ability to negotiate individualized rates and services tailored to their commercial

[4] NVOCCs must, however, publish their individually negotiated rates as tariffs, and thus cannot accommodate the desire of many shippers for the rate flexibility and confidentiality possible through the use of service contracts.

needs. In today's competitive marketplace, allowing NVOCCs to provide the benefits of service contracts on an equal footing with the VOCCS with whom they compete would substantially advance the interests of the shipping public.

The NCBFAA also agrees that the Commission has the authority under Section 16 of the 1984 Act to grant the exemption requested by UPS, BAX and Robinson. Allowing NVOCCs to enter into service contracts would provide commercial benefits to NVOCCs and their customers – lower rates, greater efficiency, confidentiality and greater flexibility to meet the individualized logistics needs of shippers. Similarly, extending the authority to enter into service contracts to NVOCCs would put NVOCCs on a comparable competitive footing with VOCCs and other intermediaries, thus increasing the overall level of competition in the ocean transportation industry. Moreover, as set forth more fully in the NCBFAA's Petition in Docket No. P5-03, removing existing barriers to full and fair competition among carriers of all types would foster greater reliance on market forces consistent with the congressional policy underlying OSRA.

Finally, UPS, BAX and Robinson also propose that they would be subject to the service contract filing and publication of essential terms requirements of Section 8(c) of the 1984 Act and Part 530 of the Commission's regulations if their petitions are granted. The NCBFAA urges the Commission to closely consider, however, whether the service contract filing and publication requirements serve any useful purpose as applied to NVOCCs. The primary purpose underlying the obligation of VOCCs to file service contracts with the Commission and to publish essential terms is to assist the Commission in ensuring that VOCCs do not abuse the antitrust immunity they enjoy by virtue of Section 7 of the 1984 Act. It is important for the Commission to have ready access to the carriers' service contracts in order to determine whether inappropriate collective action has taken place or the trade has otherwise been subjected to market-distorting activity. *See, e.g., Fact Finding Investigation No. 25 - Practices of Transpacific Stabilization Agreement Members Covering the 2002-03 Service Contract Season* (decision served May 30, 2003 and Settlement Agreement released September 11, 2003). NVOCCs, by contrast, do not enjoy antitrust immunity and operate in a highly competitive and unconcentrated marketplace. Consequently, we are not aware of any need the agency may have for similar immediate access to agreements between NVOCCs and their customers. Moreover, the cost of filing service contracts with the Commission and publishing essential terms would be an additional expense with no obvious countervailing public benefit.

II. THE EXEMPTION REQUESTED BY UPS, BAX and ROBINSON – IF MADE AVAILABLE TO ALL NVOCCs – CLEARLY MEETS THE REQUIREMENTS OF SECTION 16 OF THE 1984 ACT

A. The Commission Has Authoritv to Grant the Requested Exemption Pursuant to Section 16 of the 1984 Act.

In OSRA, Congress enacted several important changes to the 1984 Act designed to reduce regulatory costs and to place greater reliance on market forces in the ocean transportation industry. In particular, Congress's approval of the use of confidential service contracts by VOCCs, and its elimination of the right of shippers to demand "me too" contracts, were intended to foster an efficient, market-driven transportation system in the ocean commerce of the United States. Congress did not, however, intend to limit the deregulation of the ocean shipping industry to the specific changes set forth in OSRA itself. Congress also amended Section 16 of the 1984 Act to broaden the Commission's authority to grant exemptions to the requirements of the 1984 Act by deleting two of the four criteria for exemptions originally contained in the 1984 Act. By doing so, Congress intended to facilitate the grant of exemptions under Section 16 and to enable the Commission to make appropriate regulatory changes, consistent with the congressional policy underlying OSRA, beyond those changes Congress itself made in OSRA:

> The policy underlying this change is that while Congress has been able to identify broad areas of ocean shipping commerce for which reduced regulation is clearly warranted, the FMC is more capable of examining through the administrative process specific regulatory provisions and practices not yet addressed by Congress to determine whether they can be deregulated consistent with the policies of Congress.

Senate Report No. 61, 105th Cong., 1st Sess. at 30 (1997) (current version at 46 U.S.C. App. 1715 (2003)). The exemption requested by UPS meets both the express provisions of Section 16 of the 1984 Act, as amended by OSRA, and the deregulatory policies underlying OSRA itself.

B. <u>The Requested Exemption Would Not Be Detrimental to Commerce, But Would Instead Confer a Number of Important Benefits Upon NVOCCs and Their Customers.</u>

Granting NVOCCs the authority to provide transportation services under service contracts would benefit the ocean commerce of the United States by providing a number of important benefits to NVOCCs, their customers, as well as VOCCs. These benefits would include lower rates for the shipping public, greater certainty and reliability in the commercial relationships between and among VOCCs, OTIs and shippers, more efficient operations at all levels of the logistics supply chain, and increased flexibility in meeting the service needs of shippers in today's highly competitive marketplace. For example, allowing NVOCCs to enter into confidential service contracts with their shipper customers would enable NVOCCs to establish a more assured and stable supply of cargo from their customers. This more assured and quantifiable supply of cargo, in turn, would enable NVOCCs to negotiate better rates and services from carriers, which would ultimately be passed on to shippers. VOCCs, on the other hand, would gain greater certainty that their NVOCC customers would be able to satisfy their own minimum volume commitments, and VOCCs would thereby be able to more efficiently allocate their own resources. Service contracting authority would also allow NVOCCs the contracting flexibility to more readily meet the individualized needs of their customers for confidentiality, specialized services and other commercial terms than under the outmoded tariff system presently applicable to NVOCCs.

In addition, as the Commission is aware, there is an international effort *currently* being made to reform and modernize the rules governing ocean carrier liability for loss or damage to cargo. As relevant here, one of the key provisions favored by the steamship lines and shippers would be the ability to deviate from any otherwise mandatory standard of liability that would be applicable by a treaty, convention or successor to the Carriage of Goods by Sea Act, 46 U.S.C. § 1300, ***et seq.*** This ability to vary liability limits and agree to a specific forum for dispute resolution purposes, which have been referred to as the "freedom of contract" provision, is limited to bilateral agreements voluntarily entered into between shippers and carriers in their ocean transportation contracts. (Attached as Appendix A is a copy of the relevant pages of the position of the United States Government with respect to this freedom of contract issue.) It makes no sense to provide shippers with the benefit of individually tailored liability agreements in their dealings with the VOCCs, yet deny those benefits if they elect to, or are economically required to, ship using the services of NVOCCs. Moreover, if this new liability convention becomes law, the disparate treatment of VOCCs and NVOCCs will create significant confusion in the trade, where traditional and well-understood notions of liability limitations will depend for this first time on which type of carrier issues a bill of lading. Accordingly, the requested exemption is also consistent with other developing trends in this industry.

C. The Requested Exemption Would Not Result in a Substantial Reduction in Competition if Applied to All NVOCCs.

The extension of service contracting authority to NVOCCs would not reduce competition in the ocean transportation industry. To the contrary, allowing NVOCCs to enter into service contracts with their shippers would increase the level of competition in the ocean shipping industry by allowing NVOCCs to compete more effectively with VOCCs and other transportation intermediaries. As set forth above, this increased level of competition would result in lower rates, greater efficiency and better service for shippers, consistent with the congressional policy added in OSRA "to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace." 46 U.S.C. App. § 1701(4) (2003).

D. Service Contract Authority Should Not Be Restricted To A Few NVOCCs.

If the requested exemptions and granted to UPS, BAX and Robinson, however, the Commission should make clear that the exemption to enter into service contracts is also available to all NVOCCs. There is no basis in logic or policy for granting service contract authority to only some NVOCCs based upon their volume or asset base, while denying other NVOCCs the same opportunity. To do so would be patently discriminatory and would wreak havoc on the competitive marketplace that exists today, creating a new class of favored NVOCCs, while permanently relegating the remaining NVOCCs to a competitively inferior position.

As a preliminary matter, there is no principled basis to differentiate between NVOCCs on the basis of size or asset base. The customers of both large and small NVOCCs will reap the same benefits from being able to enter into service contracts with their respective NVOCCs. In particular, a shipper can be expected to receive lower rates, better service, greater reliability, confidentiality and more flexible commercial terms if service contracting is granted to its NVOCC regardless of the NVOCC's size or asset base.

Moreover, any suggestion that NVOCCs might somehow be unable to perform volume-based contracts due to the lack of so-called "heavy" capital assets is misguided. In the first place, many NVOCCs - - not just these petitioners - - *do* have substantial assets invested in truck fleets, warehouses, sophisticated computer and cargo tracking systems and other fixed assets. Perhaps more importantly, the ability to enter into service contracts generally *strengthens* the financial responsibility of NVOCCs of all sizes by increasing the predictability, visibility and stability of their supply pipelines. Put another way, if a small NVOCC is considered sufficiently responsible to engage in ocean transportation using tariff rates, there is no reasonable justification for suddenly suggesting that it is not just as responsible to provide the same ocean transportation services under a service contract. Indeed, there is no functional difference between an NVOCC and a VOCC in any trade in which the VOCC operates no vessels, but instead provides service via vessel-sharing agreements or space charters. No one would suggest that a VOCC is less likely to perform its volume-based service contracts in trades where it does not operate vessels or otherwise have heavy capital investments.

The UPS, BAX and Robinson petitions suggest that a company's asset value is an essential measure of the firm's ability to satisfy its contractual obligations to shippers and that this must be a prerequisite to its eligibility to enter into ocean service contracts. This is simply incorrect for a number of reasons. First, the Commission has required, in accordance with the provisions of Section 19 of the Act, that NVOCCs possess evidence of their financial responsibility issued by an appropriate surety. These bonds are available to satisfy the

NVOCC's liability for any damages arising out of the company's transportation-related activities, so that shippers have a ready avenue to collect from non-performing NVOCCs.[5]

Second, NVOCCs are often better able to perform their contractual obligations than are the underlying carriers. In most service contracts, shippers are accorded little in the way of service guarantees, and instead are simply promised that the carrier will provide a minimum quantity of space over some number of sailings during the course of the year. If the carrier changes port rotations, refuses bookings or rolls shipments to later vessels in favor of higher paying cargoes or reduces the number of sailings in a given trade, the shipper may have to wait longer for service; indeed, shippers often have no remedy to a total abrogation of service by a carrier other than as a reduction in their minimum quantity commitments.[6] But, through their contracts and contacts with all VOCCs, NVOCCs have a substantially larger pool of vessels to call upon in order to service the demands of their customers. Indeed, even the OTI subsidiaries of VOCCs, such as Maersk Logistics, have the advantage of being able to service their shipper customers by relying on the entire marketplace of container vessels, not just those belonging to their carrier parent. Consequently, a shipper is generally far more certain that its cargoes will move in accordance with scheduled commitments if it books its cargoes with NVOCCs, rather than steamship lines.

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[5] On the other hand, shippers have no such protection in the case of carriers, which can - - and have - - become insolvent without advance notice. When this happens, shippers' cargoes are stranded around the world, service contract obligations are not worth the paper they are printed on, shippers end up with substantial unforeseen costs for shipments stranded en route and often have no recourse whatsoever. The trade press contains many stories of such events arising out of the recent bankruptcies, for example, of ABC Container Line, Cho Yang and Senator Line. Yet, no one has suggested that VOCCs either should not be able to enter into service contracts for this reason or that they should be bonded to protect their shippers.

[6] The NCBFAA believes that any review of the service contracts on file with the Commission would demonstrate the almost total lack of meaningful and enforceable service obligations to which the carriers are obligated in most instances.

The BAX and Robinson petitions go further and would have the Commission establish criteria for an NVOCC's eligibility that are self-serving, discriminatory and, in any event, irrelevant. BAX proposes that a "qualified" NVOCC would need to satisfy three conditions:

1. "A substantial U.S.-related transportation presence, with $100 million annual transportation related gross revenue by itself of affiliated companies;"

2. Be publicly held or be an OTI that is affiliated with a VOCC; and

3. Be a "multi-modal logistics maritime transportation provider" and be compliant with the Shipping Act and the Commission's regulations.

(BAX petition at 14.)'

Although the NCBFAA does not oppose issuing the exemptions sought by these companies, and understands why these criteria are being proposed,* they cannot properly be the basis for eligibility. In the first place, just as there is no arbitrary gross revenue test for VOCCs, there is no basis for establishing such a criterion for NVOCCs. And, even if there was, there is no logic supporting the proposition that this test could be satisfied either by an NVOCC or by its affiliated companies. The liability of any corporation (subject to guaranties by other entities) is predicated by its actions and upon its balance sheet, not by any companies with which it may be affiliated. The NCBFAA sees no logical support for the notion that a company with modest

[7] Robinson proposes similar criteria, although they are phrased somewhat differently. In particular, rather than using the flat $100 million annual gross revenue test, Robinson suggests that the Commission would need to be satisfied that an NVOCC is financially stable, has a pattern of increasing revenues, is publicly traded, has sufficient assets and revenues to service long term debt, has some undefined level of capital investment and has an acceptable regulatory fitness history with the FMC. (Robinson petition at 24-28.)

[8] It appears that these petitioners are attempting to sidestep the comments of U.S. Senator John Breaux, made at the time of the enactment of OSRA that questioned the ability of NVOCCs to satisfy contractual obligations to their shipper customers. As noted above, Senator Breaux's concerns were misplaced; moreover, the views he expressed at that time do not constrain the agency from using the expanded exemption authority entrusted to it by that statute. *Infra,* at 16.

NVOCC traffic, but whose affiliate may have substantial trucking or air cargo operations, somehow is deemed worthy of having ocean service contract authority, while companies that specialize in forwarding operations and do not own aircraft or line haul trucks are not.

Nor is there logical support for requiring some arbitrary quantum of gross revenues. Why $100 million? Why not $500 million? Or $500,000? What makes a large company, with dozens or even hundreds of world-wide offices, any more responsible that a smaller company, with 1 or 5 offices, that uses a reliable, experienced system of world-wide agents? This does not seem to be an issue from the VOCC perspective, where any company operating vessels in the US trades - - whether it has dozens of vessels, like Maersk SeaLand or Cosco or only a few sailings, like Sinotrans - - is eligible to enter into service contracts.

Similarly, if only NVOCCs with large asset bases can qualify for service contracting authority, what level of assets will be required, and what assets will be counted toward the requirement? Should an NVOCC's non-ocean-related assets (such as aircraft or line haul trucks) qualify? If so, what about local drayage equipment or warehouses? What about extensive and expensive computer and software systems? Do these assets have to be owned? What about leased assets, or the assets belonging to their subsidiaries, affiliates or agents? And how are these questions relevant to the issue of whether the industry would benefit by providing this additional tool to NVOCCs.

The criteria suggested by BAX and Robinson would open a Pandora's box of problems for the agency. What criteria is the Commission to use in determining whether a particular company is financially fit to enter into service contracts? And, is the Commission to constantly monitor the financial performance of NVOCCs (and, perhaps, VOCCs), in a manner similar to the Securities and Exchange Commission, to ensure that parties remain in whatever financial status qualified them in the first instance to sign service contracts. And, why would that even be necessary from a public policy standpoint? After all, this does not involve investing in securities, with the attendant recognized need to ensure that the investors can rely on the integrity of financial statements and universally applicable trading rules.

The notion that a company must be publicly traded before being permitted to enter into service contracts is similarly flawed. Even BAX concedes recognizes that "large, publicly-held corporations are not always paragons of virtue", citing WorldCom and Enron. (BAX petition at 15, n. 32) But the list of publicly held companies that have engaged in inappropriate behavior is of course far longer than just those two companies; indeed, the financial scandals that have rocked the US economy over the past several years have included a myriad of other listed companies, as well as the auditing, consulting and billing practices of the "major" accounting firms, insider and other illicit trading practices at the largest brokerage firms and the alleged lack of financial controls of the New York Stock Exchange itself.

As an alternative to being publicly held, BAX suggests that an NVOCC would qualify for this exemption if it was related to an ocean common carrier serving the US trades. (BAX petition at 14.) Although BAX provided no justification for this alternative criterion, the NCBFAA assumes that this was meant primarily as a sop to the VOCCs and that BAX hoped that they would be less likely to oppose the exemption if their own subsidiary OTIs fell within the favored group.

If so, and while the NCBFAA also hopes that the VOCCs will not oppose the requested exemptions, it is inappropriate, unjustly discriminatory and categorically unfair to create a favored class of NVOCCs based upon their corporate affiliation with VOCCs. The very essence of the BAX and Robinson petitions is their belief that the ability to enter into service contracts would provide them, and apparently a few select others, with a competitive advantage over other NVOCCs. It is patently inappropriate, however, to establish arbitrary rules whose intent is to set up a favored class to the disadvantage of outsiders. How would the Commission prevent the establishment of this criterion from consigning those below the threshold to a permanently noncompetitive status? It is hard to imagine that the shipping public would benefit from the reduction in real competitive alternatives that would likely ensue, even if this did not lead to further consolidation and concentration in the OTI industry.

With respect to the issue of compliance with the Shipping Act, the NCBFAA shares the idea that there is no place in the shipping industry for bandits and unscrupulous companies and has long supported efforts to enhance integrity and professionalism in the forwarding, NVOCC and customs broker industries. But having had some contact with the Commission's Bureau of Enforcement is hardly justification for automatically disqualifying companies from signing service contracts. If that becomes the test, no VOCC would qualify.[9] Further, a "clean" compliance record might well only mean that a company has not had substantial ocean transportation operations and is instead primarily engaged in transportation as a trucking company or cargo airline. What evidence does one then have of that company's expertise or

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[9] In this regard, the non-compliance of VOCCs (and these are allegations, since few cases have been adjudicated) runs to significant market distorting activities, not just technical tariff or other regulatory infringements. The Commission recently concluded its investigation of the service contracting practices of the VOCC members of the Transpacific Stabilization Agreement *in Fact Finding Investigation No. 25 – Practices of Transpacific Stabilization Agreement Members Covering the 2002-2003 Service Contract Season* (Settlement Agreement released September 11, 2003) by which those parties agreed to pay $1.35 million and substantially restructure the Agreement and otherwise reform their practices. And, that proceeding fell closely on the heels of the Commission's investigation of TSA *in Fact Finding Investigation No. 23, Ocean Common Carrier Practices in the Transpacific Trades*, (decision served December 29, 1999) in which the TSA members paid a $55,000 fine and agreed to operational changes to address allegations of improper conduct with respect to the service contracts in the prior contracting year.

reliability in the ocean shipping industry. Moreover, and as the NCBFAA pointed out in its exemption petition, the shift to confidential service contracts in the post- OSRA era means that NVOCCs have necessarily become more of a target of the Commission's enforcement activities. (NCBFAA petition, at 1 l-13.) How is the Commission to determine whether a particular company is fit, from a compliance perspective, to be able to enter into such contracts?

Robinson suggests a further distinction concerning those NVOCCs that should qualify for service contracting authority and those that do not. In touting its "serious" assets, infrastructure and personnel investments, that petitioner suggests that only those parties that offer "value added services" would qualify, since those companies that only "buy and sell transportation space" are merely "paper" NVOCCs and service contracts are "relatively unimportant" to them. (Robinson petition at 18-20). Although the NCBFAA has no way of knowing to whom service contracts are important or not, it suspects that the distinction posed by Robinson is too facile and in any event incorrect.

While there are exceptions to every rule, the NCBFAA is not aware of any of its members who have not made substantial investments in transportation related assets. While the amount of those assets will logically vary from firm to firm based in part upon the number of offices and employees, those investments are always "serious" to the firm involved. Moreover, to many smaller shippers, an NVOCC's provision of competitive rates is clearly a value added service and one which, in the eyes of the NVOCC, may be enhanced through the use of service contracts. Similarly, many smaller NVOCCs do provide a package of logistics services that do more than quote transportation prices. In any event, how is the Commission to determine what constitutes an acceptable quantum of valued added services? And, does this test necessarily mean that the favored NVOCC would have to provide some array of non-transportation services on every shipment to remain eligible to enter into service contracts? And, what so-called "3PL" services qualify: storage, packing and crating, inventory, control, drayage, customs, all of the above?

E. Congress Did Not Intend to Discriminate Against "Small" OTIs

Finally, the suggestion that Congress intended permanently to deny small NVOCCs the authority to enter into service contracts is not supported by the provisions of OSRA itself or its legislative history. To the contrary, Congress made clear by amending Section 16 of the 1984 Act that it expected the Commission to advance the policy of deregulation embodied in OSRA where justified by changing conditions in the ocean shipping industry. The Petitioners reference the remarks of two Senators during debates on the proposed Gorton Amendment to OSRA (which would have extended the service contracting authority to NVOCCs) for the proposition that Congress was concerned that NVOCCs might be unable to perform volume-based contracts because of their lack of size or assets. However, the comments of two Senators -- neither of which were incorporated into the Senate or Conference report on this bill -- cannot reasonably be construed to undermine the clear deregulatory policy of Congress embodied in OSRA itself.

Moreover, the remarks of Senator Breaux makes it clear that the primary reason for the defeat of the Gorton Amendment was that it was offered after a delicate compromise had been reached on the final bill that cleared the way for passage. That the Gorton Amendment was ultimately unsuccessful cannot reasonably be construed as meaning that Congress, having instructed the FMC to remove regulatory obstacles to efficient ocean transportation, affirmatively decided that this instruction was meant to exclude the NVOCC industry.

III. THE COMMISSION SHOULD CLOSELY CONSIDER WHETHER REQUIRING NVOCCs TO FILE SERVICE CONTRACTS AND PUBLISH THEIR ESSENTIAL TERMS SERVES ANY USEFUL PURPOSE

If the Commission determines to grant the exemption requested by UPS, BAX and Robinson, it should give serious consideration to whether NVOCCs should be required to file service contracts with the Commission and publish the essential terms of their service contracts.[10] These requirements, which currently apply only to VOCCs, were designed to facilitate the Commission's oversight of VOCCs to prevent abuse of the antitrust immunity enjoyed by VOCCs. See, e.g., Statement of the Honorable Harold J. Creel, Jr., Chairman, Federal Maritime Commission, before the Committee on Commerce, Science and Transportation, Subcommittee on Surface Transportation and Merchant Marine, United States Senate (March 20, 1997), at 7-8, attached hereto as Appendix B. NVOCCs do not have antitrust immunity under the 1984 Act, and operate in a highly competitive, diverse and unconcentrated environment in which there is no realistic likelihood that concerted action would be possible or effective in constraining capacity or controlling prices. Under the circumstances, the requirement to file service contracts with the Commission and publish essential terms would seem to have little practical purpose.

The costs of filing service contracts, however, would be substantial. While VOCCs generally deal with relatively fewer large or "champion" shipper accounts, NVOs typically deal with a much larger number of shippers moving smaller volumes. Accordingly, the service contract filing and publication requirements would be far more burdensome for NVOCCs on a comparative basis than for the VOCCs, thus neutralizing at least some of the benefits likely to

[10] The filing and publication requirements for service contracts are set forth in Section 8(c) of the 1984 Act and Part 530 of the Commission's regulations, 46 C.F.R. Part 530 (2002).

flow from allowing NVOCCs to enter into service contracts. The NCBFAA believes that the service contract filing and publication requirements should not be applicable to service contracts entered into between NVOCCs and their shipper customers. Simply put, the substantial added expense required to comply with the filing and publication obligations, particularly in the absence of any countervailing public benefits, would add unnecessary regulatory costs that would ultimately have to be borne by the shipping public.

IV. THE OWL PETITION DOES NOT ADDRESS THE TRUE PROBLEMS CONFRONTING NVOCCS

As the NCBFAA understands its position, OWL seeks the initiation of a rulemaking that is intended to expand the definition and scope of "special contracts" that are currently applicable only to forwarders, per 46 C.F.R. § 515.2(v) and 5 15.41(c), for the purpose of permitting NVOCCs to establish confidential contract rates with their shipper customers. And, although those rates would be published in tariff form, they would be confidential and available for review only by the Commission and the relevant customer. Further, OWL seeks this exemption as it believes that the competitive disadvantage confronting NVOCCs stems from the transparency of tariffs. In view of its concern that the Commission may not have the authority to grant the exemption requested by the NCBFAA in Docket P5-03 (namely, to exempt NVOCCs from the requirements of establishing, maintaining and enforcing rate tariffs), OWL has proposed an alternative to the current mode of dealing with NVOCC tariffs.

It appears that OWL's preference would be to support the NCBFAA's approach to the problem, since the exemption sought by the Association would necessarily eliminate the transparency problem that concerns OWL. Moreover, eliminating the need for rate tariffs would also necessarily be substantially less burdensome to the NVOCC industry, since there would then be no need to memorialize the negotiated rate in any tariff form. OWL's concern, it thus appears, is that the FMC may not have the authority to issue the exemption sought by the NCBFAA.

The NCBFAA must respectfully disagree with OWL's view of the Commission's exemption authority and ability to grant the relief sought by the NCBFAA. Although not contending that the agency lacks the authority to grant the exemption sought by the NCBFAA, OWL questions whether the Commission will exercise that authority. (OWL petition at 15-16.) While no one will know what the agency will ultimately do until the question is squarely put and decided, the Association does not read the cited remarks of Commissioner Creel as any prejudgment on his part that there are limits to the FMC's authority to use the broadened exemption authority Congress granted when enacting OSRA. To the contrary, while noting the Commission's past reluctance to alter the general statutory scheme established by Congress, Commissioner Creel went on to state:

> Nevertheless, with OSRA's relaxation of the statutory test [for issuing exemptions], the Commission will need to assess just how it legally and commercially should examine future exemption matters."

The NCBFAA has already addressed the issue of the scope of the Commission's authority above, at 5-6, 16, as well as in its petition. Hence, there is no reason to repeat those arguments here, other than to note that the Association does believe that the FMC has the ability to address these issues using its authority under section 16 of the Act.

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[11] OWL, is here citing to then Chairman Creel's speech to the Propeller Club in California on January 27, 1999, shortly after OSRA was enacted and well before the structural shift in the industry to contract carriage had become apparent.

More to the point, the NCBFAA must also respectfully disagree with OWL's view of the problem confronting the NVOCC industry today. While it is true that NVOCC rate transparency causes problems from the perspective of the back-solicitation of accounts and upward pressure placed on shipper and NVOCC rates, the evidence strongly indicates that NVOCC tariffs are not accessed by anyone. Not carriers, not shippers and not other NVOCCs.[12] Thus, the real issue is the staggering and wasteful cost, burden and liability imposed on the NVOCC industry due to the continued existence of the anachronistic tariff system in an industry that has evolved - - due to OSRA - - to one of almost total contract carriage.

Consequently, using the Commission's rulemaking authority to add to - - rather than subtract from - - the regulatory burdens of NVOCCs would appear to be a backward step. NVOCCs need and deserve relief from unnecessary regulatory requirements; simply changing the nature of the burden, while making a modest advance toward rate confidentiality, is not the answer the industry needs.

[12] This is amply demonstrated by the comments being filed by individual NVOCCs in Docket No. P5-03. In addition, see the discussion concerning the American Shipper survey in the NCBFAA's petition (in Docket No. P5-03, at 9-10).

V. CONCLUSION

For all of the foregoing reasons, the NCBFAA supports the petitions of UPS, BAX and Robinson so long as an exemption for NVOCCs to enter into service contracts with their customers is equally available to all NVOCCs. However, the NCBFAA cannot support the OWL petition, as it does not appear to adequately address the structural problems confronting NVOCCs.

Respectfully submitted,

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DATE: October 10, 2003
235498

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Proposal by the United States of America
July 11, 2003

The United States welcomes this new initiative by UNCITRAL to promote the cause of harmonization of international transport law. Our gratitude also goes to the Comité Maritime International (CMI) for its contribution in this field.

At the ninth, tenth, and eleventh sessions of Working Group III, the delegates and observers discussed the individual provisions of the Draft Instrument[1] in isolation. This was a very helpful process, and the United States appreciates all of the constructive views that were expressed during these discussions in an effort to advance the project. We feel that the time has now come, however, to recognize that the controversial issues cannot be resolved on an individual basis. Successfully completing the present project will require commercial compromises in which the various affected industries can each achieve only some of their overall goals.

Within the United States, we have consulted with representatives of the major affected industries and they have actively participated in the negotiation process in the effort to achieve a commercial compromise that may be broadly acceptable to all of the affected interests. The current proposal, based on the results of this negotiation process, seeks to address the key contested issues comprehensively. We believe that a convention based on this comprehensive proposal will promote efficiency and uniformity in international trade.

This proposal covers ten key subjects that should be addressed in any future convention, but the proposal should be considered as an integrated whole. It represents a careful balancing of interests and equities. This does not mean that the United States is unwilling to discuss individual aspects of this proposal. It simply means that changes to one aspect of the proposal may require reconsideration and revision of other aspects in order to preserve the careful balance of interests that we believe is necessary to achieve much-needed reform. Each of the principal commercial interests involved has already made significant concessions to reach the compromise position expressed here.

[1] All references in this proposal to the "Draft Instrument" refer to the Draft Instrument on Transport Law annexed to A/CN.9/WG.III/WP.21.

> Neither an ocean carrier nor a ship is responsible for loss or damage from fire on a ship unless the fire was caused by the ocean carrier's fault or privity, with respect to a fire on a ship that it furnished. The carrier is not responsible for loss or damage from fire on a ship unless the fire was caused by the carrier's actual fault or privity.

This provision introduces the term "ocean carrier," which could be defined as "a performing party that owns, operates, or charters a ship used in the carriage of goods by sea."

4. *Ocean Liner Service Agreements*

A key issue in the United States (and we believe in other parts of the world as well) is how the Instrument should treat certain specialized and customized agreements used for ocean liner services that are negotiated between shippers and carriers. As part of the overall package, the United States believes that this kind of agreement, which we refer to as an Ocean Liner Service Agreement (‘OLSA"), should be covered by the Instrument, unless the OLSA parties expressly agree to derogate from all or part of the Instrument. A decision to derogate from the Instrument, however, would be binding only on the parties to the OLSA. There are differing views, both within the United States and internationally, on the option to derogate down from the Instrument's liability limits. Nevertheless, the U.S. view is that the parties to an OLSA should be able to depart from any of the Instrument's terms.

A. *What is an Ocean Liner Service Agreement?*

OLSAs have grown in use in many international trades since U.S. regulation of the ocean liner industry was reformed in 1984 and 1998 to allow for competitively negotiated liner service contracts. As a result, a substantial volume of liner cargo now moves under such agreements in numerous international trade routes.

OLSAs are exclusively used for liner services. They are not used for private or industrial carriage with respect to bulk, tanker, neo-bulk or other non-liner cargo services. As such, they are distinguishable from charter parties and volume contracts (mentioned in chapter 3 of the Instrument), which are used for non-liner services.

The term "liner service" is well understood in all trades. A liner operation is one used for the carriage of general cargo on an established and regular pattern of trading between a range of specified ports. Unlike private carriage arrangements, a liner vessel sails on a publicly available schedule with regular port calls, whether or not it has cargo to transport. Typically, the liner service is advertised and is available to all customers having cargo that is appropriate to move on the vessels and service offered by the carrier.

For purposes of defining contracts qualifying as OLSAs under the Instrument, the following characteristics should be present: (1) they are agreed to by the parties in writing (or comparable electronic means), other than by a bill of lading or transport document issued at the time that the carrier or a performing party receives the goods; (2) they are used for liner services; (3) they involve a carrier service commitment not otherwise required of carriers under the Instrument (e.g. the obligation of the carrier to properly receive, load, stow, carry and deliver the cargo); (4) the shipper agrees to tender a volume of cargo that will be transported in a series of shipments (i.e., the contract covers more than a single shipment); and (5) the shipper and carrier negotiate rates and charges based on the volume and service commitments.

B. *Treatment under Chapter 17 versus Chapter 3 of the Draft Instrument*

The United States believes that, as a general matter, all shipments moving under OLSAs should be subject to the Instrument, except to the extent that the parties specifically agree to derogate from all or part of the Instrument's provisions. This will ensure that the majority of traffic moving under OLSAs are subject to the Instrument, unless the contracting parties expressly agree to derogate. Any agreement to derogate from the provisions of the Instrument shall be binding only on the parties to the OLSA. Thus, when bills of lading or other transport documents are issued for OLSA-based shipments, any party to or holder of the bill of lading or transport document that is not also a party to the OLSA would not be bound by any agreement to derogate from the Instrument.

Allowing parties to agree on specialized terms enhances efficiency and has promoted services better tailored to the needs of international businesses. The experience of almost 20 years has shown that neither carrier nor shipper industries are particularly disadvantaged in terms of negotiating power with regard to basic transport terms. Rather, the parties to an OLSA often enter into such contracts with the purpose of designing a customized transportation relationship based on the business needs of the parties.

If OLSAs are addressed in chapter 3 and excluded from the Instrument under article 3.3.1, thousands of liner shippers, and a substantial volume of cargo, would be outside of the scope of the Instrument unless the parties entered into a contract which successfully applied the Instrument as a matter of private contract. The United States strongly opposes this approach. We believe that the Instrument should be the norm that automatically applies door-to-door as between shipper and carrier for shipments moving under an OLSA. When the needs of commerce so require, however, commercial parties should be free to structure their transport arrangements as they see fit, which includes an agreement to derogate from the Instrument.

Concern has been expressed that this provision might be unfair to smaller shippers. In practice, this has not been the case with regard to the ability of small shippers to enter into and negotiate the rate and service terms of liner contracts. Moreover, if any shipper is dissatisfied with the result of an OLSA negotiation, it may choose not to enter into the contract and may ship its cargo pursuant to the standard price lists or tariffs typically offered by the liner carriers, or it may ship with a competing carrier. The availability of such standard tariff terms and regularly available competitive alternatives also distinguishes liner shipping from other forms of maritime transport.

Unlike treaties dealing with passengers and luggage, which primarily involve carriers and consumers, it is noteworthy that the Instrument will deal almost exclusively with businesses familiar with the requirements of international transactions. A basic level of business knowledge is needed by buyers and sellers of goods to deal with purchase orders and sales agreements, logistics, transfer of title, packing, customs duties, security, letters of credit and other financial documentation, warranties, and insurance. Such parties should also be capable of negotiating special liability terms as part of a particularized contractual transportation service arrangement should they so desire.

Finally, because of an issue created by U.S. law, which effectively prevents non-vessel operating common carriers (NVOCCs) from entering into OLSA-type agreements with their customers, we are willing to address certain concerns raised by these interests to avoid unduly disadvantaging NVOCCs. In particular, it would be acceptable to include a provision prohibiting ocean carriers from entering into OLSAs with NVOCCs that include liability limits lower than the standard provided in the Instrument.

C. *Recommendation*

To implement this aspect of the proposal, article 17 should be amended to give the parties to an Ocean Liner Service Agreement the freedom to modify the Instrument's liability terms as explained above. In addition, the term "Ocean Liner Service Agreement" should be defined in the Instrument as follows:

> (a) An "Ocean Liner Service Agreement" is a contract in writing (or electronic format), other than a bill of lading or other transport document issued at the time that the carrier or a performing party receives the goods, between one or more shippers and one or more carriers in which the carrier or carriers agree to provide a meaningful service commitment for the transportation by sea (which may also include inland transport and related services) of a minimum volume of cargo in a series of shipments on vessels used in a liner service, and for which the shipper or shippers agree to pay a negotiated rate and tender a minimum volume of cargo.
>
> (b) For purposes of paragraph (a), a "meaningful service commitment" is a service commitment or obligation not otherwise mandatorily required of a carrier under this Instrument.
>
> (c) For purposes of paragraph (a), a "liner service" is an advertised maritime freight transport service using vessels for the carriage of general cargo on an established and regular pattern of trading between a range of specified ports.

(d) An Ocean Liner Service Agreement does not include the charter of a vessel or the charter of vessel space or capacity on a liner vessel.

5. *Forum Selection*

A. *General Rule*

As part of the overall package, the United States believes that the Instrument should limit the permissible forum for litigating or arbitrating claims to certain reasonable places. As a general rule, an approach substantially along the lines adopted in the Hamburg Rules would be acceptable, but two principal revisions would be necessary. First, the Hamburg Rules give the choice among the specified forums to "the plaintiff," leaving open the possibility that a carrier (the potential defendant in a claim for cargo damage) could bring an action as the plaintiff for a declaration of non-liability, thus preempting the choice that properly belongs to the injured claimant. The Instrument should clarify that the choice is the claimant's. Second, the list of reasonable forums should be defined as:

(i) the place where the goods are initially received by the carrier or a performing party from the consignor, or the port where the goods are initially loaded on an ocean vessel;
(ii) the place where the goods are delivered by the carrier or a performing party pursuant to article *4.1.3* or 4.1.4, or the port where the goods are finally discharged from an ocean vessel;
(iii) the principal place of business or habitual residence of the defendant; or
(iv) the place specified in the contract of carriage or other agreement.

This list differs from the Hamburg Rules list in two principal respects. It uses the places of receipt and delivery in addition to the ports of loading and discharge. This change simply recognizes the Instrument's potential door-to-door application (in contrast with the Hamburg Rules' port-to-port application). The place of contracting is also omitted from the

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THE HONORABLE HAROLD J. CREEL, JR.

CHAIRMAN, FEDERAL MARITIME COMMISSION

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

SUBCOMMITTEE ON SURFACE TRANSPORTATION AND MERCHANT MARINE

UNITED STATES SENATE

MARCH 20, 1997

Madam Chairman and Members of the Subcommittee, it is a pleasure to appear before you today to discuss the Federal Maritime Commission's views on S.414, which have been jointly sponsored by yourself and Senators Lott, Gorton, and Breaux. Accompanying me today is Thomas Panebianco, the Commission's General Counsel. I am also pleased to be sharing the table today with my good friend Linda Morgan, with whom I had the pleasure of working for many years in this very Committee.

You and your staff are to be commended for working with all segments of the ocean transportation industry and obtaining their input before crafting this delicate compromise to amend the Shipping Act of 1984 ("1984 Act") and for holding this hearing on these contentious but significant issues. We appreciate your concern for the views of the FMC on this bill today as well as during the drafting stage.

Madam Chairman, this agency's mission is not so much to regulate ocean shipping, but to ensure that the mode by which 94% of our nation's imports and exports are transported -- that is, ocean transportation -- remains fair and efficient, and that it promotes, rather than encumbers, our nation's foreign trade. The FMC, on its budget of $14 million, oversees the means by which U.S. trade, over $440 billion in imports and exports, moves, and ensures that U.S. interests and operations are afforded fair treatment and opportunities to published in their tariffs. I, on the other hand, applaud the bill for including this minimal and non-intrusive safeguard. The alternative is to have tariffs published which are meaningless and which serve only to mislead shippers into believing that the tariffs reflect actual freight rates. We would not expect taxis to publish a fare schedule in their cabs, and then to charge passengers a different fare based on the passengers' status or nationality. Similarly, I suggest that Congress scrupulously avoid endorsing a system wherein carriers publish rates for public inspection and then assess charges, based on whatever criteria they choose, bearing no relation to the published rates. While the bill commendably provides greater flexibility in commercial relationships, a minimal level of transparency will ensure that this flexibility not result in discriminatory or other activity which is ultimately injurious to U.S. interests. Moreover, if a carrier does not want its transportation rates to be known, it still has the option under this bill to contract confidentially with its shippers.

Transportation Intermediaries

The Commission generally supports the concept of combining what are presently two separate entities -- the ocean freight forwarder and the non-vessel-operating common carrier (NVOCC") -- into a newly defined ocean freight forwarder. These entities have historically acted as middlemen in the ocean transportation chain between the shipper and the ocean common carrier -- and their functions have often been performed by the same or related companies. It makes good sense to treat them similarly for regulatory purposes.

In this regard, the treatment of ocean freight forwarder bonding is particularly commendable. Section 19(b) (2), will give persons injured by the transportation-related activities of an ocean freight forwarder two options -- (1) making a claim to the forwarder's surety company, which would determine the validity of the claim, or (2) if that fails, obtaining a judgment for damages. The provision allowing surety companies to pay on valid claims was meant, we understand, to alleviate a claimant's expenses inherent in obtaining a judgment, and also to give the surety company an opportunity to question the validity of a claim before a judgment (often a default judgment) is entered. By preserving the judgment option, however, bad-faith denial of claims will be precluded. This would give the bonding companies discretion to pay on covered claims, but require them to pay on covered judgments.

We understand, however, that some in the NVOCC/forwarder community are concerned that this provision would allow surety companies to pay meritless claims and then to collect the payout amount from the insured's collateral, all without the insured's consent. This concern, I believe, could be addressed by a minor revision. The bill currently gives the surety the right to pay a claim not based on a judgment after providing the forwarder the opportunity to address the claim's validity. This could be revised to allow the surety this option only if the insured either consents to payment, or does not respond to valid notice.

The Commission is aware that there have been some questions raised about what activities are covered by an ocean freight forwarder's bond. To the extent that legislative guidance is necessary, we believe that it would be better suited as report language, rather than statutory language

Lastly, the Commission notes that the existing prohibition against disclosure of certain proprietary information set forth in section 10(b)(16) of the 1984 Act (10(b)(14) of the bill) only applies to common carriers. As a result, an ocean freight forwarder acting as defined in paragraph (18)(A) of section 3 of the 1984 Act would not be subject to these strictures. However, the Commission has received informal complaints from shippers alleging that ocean freight forwarders are disclosing sensitive business information. we would suggest, therefore, that the 1984 Act be modified to include ocean freight forwarders within the ambit of this prohibition.

Below-Market Pricing

One of the major improvements in the bill is the treatment of controlled carriers. As originally introduced, S.1356 would have extended strict public utility-style rate regulation -- currently applicable only to carriers owned or controlled by foreign governments -- to private carriers as well, if those carriers were "affiliated with nontransportation entities or organizations . . . in such a way as to affect their pricing or marketplace behavior." In effect, the full panoply of strictures against controlled carriers would have been applied to a whole new class of carriers. Serious concerns were raised with this approach, including that it would dampen price competition and result in higher rates for shippers, would be burdensome and expensive to administer, and would unnecessarily harm our relations with other maritime nations.

I am pleased to see that these concerns have been addressed. The bill now addresses the problem of harmful, below-market pricing by amending Section 19 of the Merchant Marine Act, 1920. Thus, the bill makes it clear that carrier "pricing practices" are fully subject to the strictures of section 19. This approach would allow the Intermodal Transportation Board on its own initiative or a private party, by petition, to address actual harmful conduct, and does not require a whole new class of carriers to be subjected to the various proscriptions against controlled carriers.

In this regard, the Commission also supports the proposed change to the definition of "controlled carrier" in section 3(8) of the 1984 Act. The Amendment removes the requirement that a carrier is controlled only if it operates vessels registered in the country which controls it. This will prevent controlled carriers from avoiding the significant requirements of section 9 of the Act by using "flag of convenience" vessels for their U.S. services.

The Commission also notes that the Amendment would delete three current exceptions to the controlled carrier provisions. We take no position on whether these chances are warranted on policy grounds. However, we would be remiss if we did not point out that all of these changes to address below-market pricing, including the deletion of the three exceptions, could augment the agency's responsibilities for monitoring and reviewing carrier pricing activity, resulting in the need for additional agency resources.

Agreements

The bill continues to permit agreements among ocean common carriers to obtain antitrust immunity if they meet certain statutory requirements. The Commission fully supports this decision. However, we do believe that some changes to the section 6(g) "general standard" governing carrier agreements are necessary to allow the Commission more flexibility and discretion in overseeing